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Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

7297A

IN THE
Supreme Court
OF THE
STATE OF UTAH

KENNECOTT COPPER CORPORA-
TION, a corporation,

Appellant,

vs.

STATE TAX COMMISSION,

Respondent.

BRIEF OF APPELLANT

Dated May 1, 1949

C. C. PARSONS,
WM. M. McCREA,
A. D. MOFFAT,
CALVIN A. BEHLE,
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Appellant,

vs.

STATE TAX COMMISSION,

Respondent.

} Case No.
7297

BRIEF OF APPELLANT

Dated May 1, 1949

I.

STATEMENT OF FACTS

Here is presented the single question of whether certain federal subsidies paid to appellants during the year 1944 should be included in its Utah Mining Occupation Tax base as part of "the gross amount received

for or the gross value of metalliferous ore sold.” (§80-5-66, U.C.A. 1943.)

1. Appellant's Operations.

Appellant owns and operates various mining properties including the well-known Utah Copper Mine at Bingham Canyon, Utah; from the mine its ores are transported to its mills at Magna and Arthur, Salt Lake County, Utah; thence its mill-concentrates are smelted in Utah and elsewhere and then refined on a contract or toll basis by various independent smelting and refining companies; and finally the end-product, appellant's refined copper, is eventually sold. (R. 16-18.) The gross proceeds from these bona fide contracts of sale have been duly reported to the State Tax Commission as required by law, and the statutory mining occupation or severance tax has been paid thereon. (R. 23-4.)

2. The Deficiency Assessment.

During the year 1944 appellant received from the Federal Government subsidy payments by authority of Congress (50 U.S.C. App. §902(e)) which authorized the Government to pay such subsidies “in such amounts and in such manner and upon such terms and conditions” as are determined to be necessary to obtain “maximum necessary production,” here of copper. (R. 18, par. 5a.) The respondent Tax Commission, over appellant's objection, included these subsidies in appellant's occupation tax base, resulting in an additional tax of \$9,190.15. (R. 26, par. 13.)

3. Payment, and the Suit Below.

Appellant also paid this deficiency, but under protest (R. 26, par. 13), and then as provided by statute brought suit in the District Court of Salt Lake County to recover that amount. Respondent's demurrer to appellant's amended complaint (R. 16-30) was sustained (R. 34); appellant stood on its amended complaint and the action was dismissed (R. 38-40); and an appeal was duly taken to this court (R. 41.)

4. The Federal Subsidies.

Under the Federal Subsidy Statute above, the Administration in carrying out the will of Congress has wide authority to set not only the amounts to be paid, but also the terms, conditions and manner of payment; the test is the end of maximum necessary production. (R. 18-21.) The subsidies may or may not be tied in with price control. (R. 21, par. c.)

In this case, *which alone is here involved in contrast to others previously or now before this court*, the amounts, terms, conditions and manner of payment were prescribed by a letter-agreement of May 13, 1942. (R. 28-9.) Periodic affidavits to support appellant's performance of this agreement were subsequently filed in effect as payment vouchers, of which a typical sample is that dated January 4, 1943. (R. 30.)

From an examination of this agreement and the record it appears:

(a) Each of appellant's properties, of which the

Utah Copper Division is but one, was assigned a production quota. The quota for Utah Copper Division for the year in question was 46,000,000 pounds. (R. 7, par. 8a.)

(b) The Government agreed to pay appellant for production in excess of this quota a subsidy of 5c per pound. (R. 5, par. a; R. 28.)

(c) The basis for determining appellant's pounds of production was its monthly affidavits of "returnable" copper (R. 23, 29, 30), computed on 97% of the concentrate assay samples after milling at Magna and Arthur and without regard to subsequent smelting, refining or sale of the refined product. (R. 23, par. b.)

(d) The time of payment was in due course after submission of these monthly affidavits and without regard to subsequent smelting, refining or sale, the sale, however, generally occurring in the course of normal operations approximately three months after milling. (R. 23, par. b.)

II.

STATEMENT OF ERRORS

As indicated above, the single question presented for determination is whether or not the court below erred in dismissing appellant's amended complaint which, alleging the foregoing basic facts fully amplified, asserted that these particular federal subsidies for the year in question should have been excluded from the

appellant's mining occupation tax base.

III.

ARGUMENT

1. This court has not heretofore determined the particular question here presented.

The District Court below presumably relied upon Combined Metals Reduction Co. et al v. State Tax Commission, 176 P. 2d 614, to which cases appellant was not a party.

It is respectfully submitted that the facts here differ from the records in those cases and that accordingly the rule there announced does not extend to the instant case.

There, said the main opinion of the court at page 617, the records showed that the Government had fixed the terms, conditions, manner and time of lead-silver subsidy payments so that "the premium prices were paid only for such metals as were not only produced in accordance with the requirements of the plan, but which were also sold." Referring again to the records in those cases, the court said:

"It is self-evident that metals are not paid for under settlement contracts unless such metals are sold."

The basis for that statement apparently was that the records showed, at least in some of those cases, that the subsidies were paid at the time of and in connection with

the delivery and sale of the ores and concentrates to the various smelting companies; these smelting companies as buyers paid the mine operators, who were the protesting taxpayers, not only the fixed government prices as the purchase price for the ore under their settlement contracts, but also the federal subsidies; and the smelters acted as agents of the United States Government for this purpose.

Consequently three members of this court as then constituted could have some basis for saying that "in reality" what the sales to the smelters in those cases "yielded" was the combined total of the settlement contract purchase price and the federal subsidy. (Of course the statutory wording is not "yielded", as in the case of Montana, but "the amount of money or its equivalent *actually received*" under bona fide contracts of sale. § 80-5-66a.)

In sharp contrast the record here shows that "the amount of money or its equivalent actually received" by Kennecott under its bona fide sales was the proceeds from the sales prices for its refined copper; and the federal subsidy payments had no relationship to those sales. The federal bonuses were no different, for example, than might be a bonus from the State of Utah for maintaining steady employment rolls. Corporate income, perhaps, *but not money or its equivalent actually received under bona fide contracts of sale.*

2. The subsidies here paid were not "actually received under bona fide contracts of sale."

As we know, the Tax Commission itself in the years before the Combined Metals cases, the minority of this court, and the Supreme Court of Montana (Klies v. Linnane, 156 P. 2d 183) all differed with the majority opinion even as restricted to the Combined Metals case records.

The question then is if this court is now willing to extend the Combined Metals doctrine to the factual situation in this case where the record shows that the subsidies were *not* paid as a part of the sale and had no connection therewith. If the position of the Tax Commission is to be sustained, of course the effect will be to rewrite the statutes of this state — as they were enacted in 1937 long before World War II and the era of mining subsidies—to include in the severance tax base not only amounts received *from sales*, but “for mining production from any source”.

If federal bonuses are to be continued, as is urged by a substantial segment of our society, and the Government does not object to state taxation of its subsidy payments with its operating costs proportionately increased thereby, it might be a proper policy for the State of Utah to broaden its occupation tax base to include this source of revenue. But is such policy not for the Legislature of the State of Utah to adopt or reject?

Respectfully submitted,

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